No. 10

IN THE

Supreme Court of the United States

October Term, 1945

THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL.,

Petitioners

vs.

THE UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR THE PETITIONERS THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, *et al.* Upon the Questions Propounded by the Order Entered Herein on June 18, 1945

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SUBJECT INDEX

CASES CITED

STATUTES CITED

MISCELLANEOUS

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The Issues for Rejoinder

The position of the Government upon the questions propounded by the order made herein on June 18, 1945, narrowly confines the issues for a reply.

The parties are in accord that Section 6 of the Norris-LaGuardia Act applies to criminal prosecutions under the Anti-Trust Act. Applicability of this section to the labor defendants in this case is conceded (Brief for the United States on reargument, pp. 4-8).

These questions emerge:

1. What are the requirements of Section 6?

2. Was the case tried in conformity with such requirements?

3. If not, what effect did the failure of the Trial Court to apply the section have upon the rights of each defendant?

There can be no question but that each defendant sought to invoke the rights existing under this law, and duly excepted and assigned error upon denial (R. 1529-1533). Even if they had not, Section 6 was enacted as a limitation upon the jurisdiction and authority of the court (Norris-LaGuardia Act, 29 U.S.C., Section 102).

At the outset we wish to correct any confusion which might arise from the statement contained in the brief for the United States (p. 44) that the individual labor defendants have not raised any question in their petitions for certiorari or original briefs in this Court as to the adequacy of the evidence on this issue as to them. The question of the error here involved as to the individual labor defendants is the subject of Specification No. 10, n. 5, of our petition for certiorari, based upon the refusal to instruct the jury as to the requirements of Section 6. The general insufficiency of the evidence as to all of these petitioners is urged in our original brief for petitioners, The Bay Counties District Council of Carpenters, *et al.*, pp. 7-27, based upon the immunities of the Clayton and Norris-LaGuardia Acts. Upon the points designated for reargument, the question as to these petitioners is not the sufficiency of the evidence irrespective of the principles of law in issue, but rather the proper tests to be applied to that evidence in determining the question of guilt or innocence.

I

The Requirements of Section 6

The Government's brief on reargument, p. 4, begins with the premise that Section 6 merely prescribes the rule applicable in criminal cases apart from the Norris-LaGuardia Act.

Yet Respondent thereafter launches into an argument that Section 6 prescribes only the rule of imputed responsibility applicable to civil cases. Respondent contends that "actual authorization of such (unlawful) acts," means authority "implied" from a general grant of authority. In other words, the ordinary civil agency doctrine that a principal is liable for an agent's acts "within the scope of his authority" is suggested as the true meaning. The negative is then asserted that the history of the Norris-LaGuardia Act shows no intention to require an express authorization for each individual act.

The plain, simple language of this section belies the argument. The direct subject matter is responsibility or liability for the unlawful acts of others—in the language of the statute—"* * * *unlawful acts* of individual officers, members or agents * * *." Such responsibility is made to depend upon "* * * clear proof of actual participation in, or actual authorization of, *such acts*, or ratification of *such acts* after actual knowledge thereof." (Emphasis added.) Defendants cannot possibly advance a stronger answer than to quote this crystal-clear language of the section. The terms of the statute require no clarification.

1. The remedy sought to be effected by Section 6 gives no aid to the Government's contentions.

After freely conceding that Section 6 affects Sherman Act cases, Respondent urges at some length that the evil at which Section 6 was directed was not the type of situation involved here. It is pointed out that some proponents

of the Norris-LaGuardia Act were particularly conscious of incidents where unions and their officials had been held liable for unauthorized acts of violence of individual members based upon an alleged application of the law of conspiracy.

The rule of Section 6 must necessarily be of general and uniform application. Specific incidents which may have prompted its enactment would throw only indirect light (if any at all) from the standpoint of judicial interpretation.

Whatever is to be gained from this source of inquiry militates against the position of the Government. Upon the construction offered here by Respondent, a union would still be held liable for the acts of violence of individual members, if authority could be implied from the general grant of authority or the act considered to be within the scope of authority, as, for example, authority to participate and assist in a strike by the union. And this would follow even without reference to the character of instruction found in the instant case where the jury was charged that defendants would be liable for "an act which an agent has assumed to do * * * while performing duties actually delegated to him."

2. Section 6 provides in clear terms a formula and criterion for criminal responsibility made equally applicable to corporations, associations and individuals.

The Government claims that the legislative history shows no intention to change the principles of the law of agency. For support, reference is made to Senate Report 163, 72d Congress, 1st Session, p. 20, quoted at pp. 20, 21, of the brief for the United States.

The principles being here invoked, however, are rules of criminal responsibility. What the Government's argument misses is that the section deals with "unlawful" acts, and that the "unlawful" acts are here said to be such by reason of being crimes.

Apart from the text of the section which is itself conclusive, the following quotation from the above mentioned Senate Report shows this to the point of demonstration: "The distinction should be clear. A man operating a dangerous machine negligently injures someone and the negligence is imputed to the employer, but there is a distinction between the torts of an employee and the crimes of an employee, and criminal responsibility is not to be imputed."

Section 6 deals specifically and exclusively with "unlawful" acts. In so doing, it sets up rigid but appropriate tests of responsibility.

It is also to be observed that Section 6 relates generally to the responsibility of one party fo the unlawful acts of others. It is not confined to parties in the relationship of principal and agent. It follows that the construction of the section proposed by the Government as covering acts within the scope of authority could not in practice be applied uniformly as the test.

While the formula of "acts within the scope of authority" could have no bearing as between individuals where the relationship of principal and agent does not exist, yet labor defendants with common authorized union objectives had been held to come within the principles of the law of conspiracy as accomplishing a lawful purpose by unlawful means. It is clear that Section 6 works qualifications upon such doctrine which had been invoked in labor cases prior to its enactment. It is equally clear that those qualifications are worked to the full extent that the wording of the section unequivocally declares.

3. Under Section 6 labor organizations are not liable for the unlawful act of an officer or member within the scope of a general grant of authority; actual authorization of the unlawful act is the test.

It is significant that to carry the burden of the argument to the contrary, Respondent departs entirely from the language of Section 6.

It is not profitable to examine the corporation cases where the commonly rejected defense of *ultra vires* was raised. The question here is not one of power but the existence of actual authority for a specific unlawful act.

The Government makes the halfhearted assertion that the instant case might fall within the class of cases where the mere doing of an act is a statutory offense irrespective of an intention or wilfulness, citing for comparison:

> *U. S.* v. *Patten*, 226 U. S. 525, 543;
> *U. S.* v. *Reading Co.*, 226 U. S. 324, 373;
> *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 243.

That the principle does not apply in a Sherman Act case to the conduct of a labor organization admits of no dispute. It has been realistically recognized that many union activities may restrain trade in and of themselves without violating the Sherman Act:

> *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469;
> *U. S.* v. *Hutcheson*, 312 U. S. 219;
> *Allen Bradley Co.* v. *Union*, 325 U. S. 797, 810;
> *Scheckter* v. *Union*, 295 U. S. 495, 547.

The Government recognizes that in criminal cases involving individuals, it is held that a principal is liable only for his own acts or those of the agent which he has expressly assisted or encouraged, citing with others the case of *Paschen* v. *U. S.*, 70 F. (2d) 491, 503 (C. C. A. 7).

It is then suggested that a less stringent rule has been applied to corporations than individuals. We call attention to the fact that Section 6 does not differentiate as to the responsibility of an association or organization or its officers or members. The test of liability for the acts of others is identical as to each.

The cases cited by Respondent are not instructive in construing Section 6. The case upon which the Government seems to place principal reliance is *New York Central R. R.* v. *U. S.*, 212 U. S. 481. It was there held that a criminal statute which adopted the civil test as to imputed responsibility for the act of an agent was constitutional when applied to an offense committed by the omission of a required act or by purposely doing a prohibited act. The violation there involved was a rebate of freight rates to shippers.

It is enlightening to compare a pertinent portion of the Elkins Act, 32 Statutes 847, under which that case arose, with Section 6 of the Norris-LaGuardia Act. The Elkins Act provided in part that

> "In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person."

The opposite is found in the language of Section 6 that "no officer or member of any association or organization, and no association or organization, * * * shall be held responsible or liable * * * for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

The case of *Eagan* v. *U. S.*, 137 F. (2d) 369 (C. C. A. 8), relies primarily upon the *New York Central* case and

Washington Gas Light Co. v. *Lansden*, 172 U. S. 534, a civil case. None of these cases had anything to do with the Norris-LaGuardia Act. In the *Eagan* case the Court stated (p. 379) the test to be, for the purposes of that case, "whether the agent or officer when doing the thing complained of was engaged in 'employing the corporate powers actually authorized' for the benefit of the corporation 'while acting within the scope of his employment in the business of the principal.'" Application of this broadly stated principle to corporate crimes where intent is an essential factor may be doubted. (See *C. I. T. Corporation* v. *United States*, 150 F. (2d) 85, 90—C. C. A. 9.) But regardless of the accuracy of this definition of corporate responsibility in the ordinary cases for the act of an agent, the *Eagan* case is not an authority bearing upon the proper interpretation of the tests contained in Section 6 to govern the responsibility of both organizations and individuals engaged in a labor dispute for the unlawful acts of others.

II

The charge to the jury violated the fundamental concepts of Section 6.

The charge of the Trial Court to the jury treated the Norris-LaGuardia Act as being generally inapplicable to the case. This is apparent from the instructions as a whole (R. 1150, *et seq.*), and preceding evidentiary rulings (Opening brief for these petitioners, pp. 59-73).

In the face of this, Respondent undertakes the impossibility of arguing that the requirements of Section 6 were met.

At the risk of undue repetition, we know of no better way to demonstrate that impossibility than to again quote what the Government contends to be the equivalent.

Said the Court: The unions are liable for "The act of an agent done for or on behalf of a * * * (union) and within the scope of his authority, or an act which an agent has assumed to do for a * * * (union) while performing duties actually delegated to him * * *" (R. 1137, 1138).

Section 6 of the Norris-LaGuardia Act says: "No association or organization * * * shall be held responsible or liable * * * for the unlawful acts of * * * agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." Further argument seems to us to be superfluous.

Respondent's brief suggests that the individual defendants have no standing to object to the foregoing portion of the charge. But as to them the error was one of omission. Their convictions may well have resulted from what was not said. Appropriate application of the principles of Section 6 was sought by them in Requested Instruction No. 58, reading as follows:

> "You are instructed that no individual defendant who is an officer or member of one of the labor organizations involved can be found guilty in this case for an unlawful act, or acts, if any, of other officers, members or agents of such union organizations, except upon clear proof from the evidence that such individual defendant actually participated in or actually authorized such an act or ratified such unlawful act, if any, after actual knowledge thereof" (R. 1174).

Neither it nor the equivalent was given. It is common sense and settled law that a defendant is entitled to have his defensive theories presented by appropriate instructions. When a correct proposition of law, essential to the proper determination of issues before the jury, is proposed by the defendant and not given in substance or effect, the refusal is error.

Hersh v. U. S., 68 F. (2d) 796, 807 (CCA 9).

To alleviate the error of the refusal, Respondent refers to a general portion of the charge (R. 1153), which instructed that each defendant was entitled to independent consideration of the evidence as it related to his "conscious participation in the alleged unlawful acts." When this is considered in its setting, combined with a lengthy charge as to the law of conspiracy (R. 1140-1144), it is entirely lacking as a substitute for the clear mandates of Section 6.

Juries are not to be instructed by equivocal language or implication.

M. Kraus & Bros., Inc. v. *U. S.*, Case 198, Supreme Court of the United States, October Term, 1945, decided March 25, 1946;
Bird v. *U. S.*, 180 U. S. 356, 361;
McAffee v. *U. S.*, 105 F. (2d) 21, 26 (CCA, Dist. of Columbia);
Hendrey v. *U. S.*, 233 Fed. 5, 17 (CCA 6).

III

Denial of the rights under Section 6 was prejudicial to each of these defendants.

1. The Individual Defendants

Respondent dismisses the cases of the six individual union defendants with the comment that they consciously and deliberately participated in the employer-employee combination, so are guilty anyway. This assumes the propriety of a directed verdict of conviction and that there was no jury question. Regardless of approach to any of the basic issues in the case, Respondent is invariably driven to that position ultimately in an attempt to support the convictions.

The negotiating or signing of a closed shop agreement covering terms and conditions of employment certainly

cannot be a conclusive badge of guilt. It could not be under any view of the law where the agreement expressly disavowed application to interstate commerce (R. 284, 285). But clearly under the last expression of this Court, the pursuit of legitimate labor objectives or a purpose to aid and abet employers to restrain trade and stifle competition is the ultimate test. *Allen Bradley* v. *Union*, 325 U. S. 797.

The evidence directly affecting personal activity of each defendant is a minute portion of the whole. Yet the lengthy record is replete with acts of other union defendants combined in pursuit of common labor objectives. To say that this great mass of evidence relating to the acts of others did not weigh against each individual is to ignore reality.

As to the defendant Roe, who did not participate in the negotiation or signing of any contract and who did not even belong to a millworkers' union involved, Respondent argues that admittedly there is evidence to show that he advised a dealer not to bring in ready-cut houses, irrespective of whether they had the union label. This ignores defendants' version of the evidence which was that such material could not carry the label because the Brotherhood did not put it on that type of product; that under that condition the dealer could bring in all of the material he wanted but the carpenters would not erect it (R. 1025, 1026). The essential predicate is that the weight and effect of the evidence is not for Respondent or petitioners to judge, but for the jury. In doing so, they should judge it under applicable rules of law and not convict a defendant because of the cumulative weight of acts in which such defendant has had no part. This is particularly true where union activity identical in nature may be lawful or unlawful, dependent upon the connection with an employer conspiracy.

2. *The Local Union Organizations*

Respondent's summarization of evidence affecting Bay Counties District Council, Local No. 42 and Local No. 550, while far from complete as to acts of officers and agents of these unions, serves only to magnify the error of the charge and refusals to charge here involved. This is illustrated by the conclusion reached at page 56 of the Government's brief that the evidence is clear that the union petitioners "actually authorized" the acts of their officers and agents. It is not a question of the evidence being sufficient to satisfy Section 6. It is a question of the jury determining guilt or innocence of these defendants under the requirements of that law.

In this connection defendants take sharp issue with the interpretations placed upon the evidence by the Government. There is also much direct conflict in the testimony. For example, the statements attributed to the secretary of Bay Counties District Council (Government's brief, p. 52) were denied or explained by that individual (R. 846-850).

Respondent's brief at page 55 makes a mistaken comment concerning the vote of Local 42 against approval of the 1936 agreement. Local 42's adverse vote is not attributable to a lowering of the wage scale from $9.00 to $8.50. This refers to the situation in 1938 when Local 42 accepted a 50¢ reduction from the arbitration award to get a uniform agreement for six counties (R. 771-774, 834-839, 1034-1035). In 1936 Local 42 voted against the agreement as fixing a wage appropriate to truck drivers and not suitable to skilled mechanics (R. 1018-1023, 813-814, 426-427, 759). Yet this is the scale to which the employers are charged with having acceded in exchange for union assistance to exclude materials (R. 28). This, however, is all largely beside the point. We revert to the

obvious proposition that evidentiary controversies were for determination by the jury, guided by proper instructions upon applicable principles of law.

CONCLUSION

The judgment should be reversed as to these petitioners.

Respectfully submitted,

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